1-0907-14110-1

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE BOARD OF PSYCHOLOGY

In the Matter of the Amendment to the Rules of the Board of Psychology Relating to Fees; Minnesota Rules 7200.6100, 7200.6105 and 7200.6175

REPORT OF THE ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on March 29, 2001 at 10:00 a.m. in the Mississippi Room, Department of Health, 1645 Energy Park Drive, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20 to hear public comment, determine whether the Board of Psychology (hereinafter referred to as "the Board") has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, evaluate whether the proposed rules are needed and reasonable, and assess whether or not any modifications to the rules proposed by the Board after initial publication are substantially different from the rules as originally proposed.

Nathan Hart, Assistant Attorney General, 525 Park Street, Suite 200, St. Paul, Minnesota 55103, appeared on behalf of the Board at the hearing. The agency hearing panel consisted of Pauline Walker-Singleton, Executive Director of the Board; Juli Vangsness, Accounting Officer; and Samuel Albert, Ph.D., L.P., the Chair of the Board. Thirty persons attended the hearing. Eighteen persons signed the hearing register. The Administrative Law Judge received the agency's procedural exhibits and five public exhibits as evidence during the hearing. The hearing continued until all interested persons, groups, or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments until the close of business on April 5, 2001, five working days following the date of the hearing. Pursuant to Minn. Stat. § 14.15, subd. 1 (2000), five additional working days were allowed for the filing of responsive comments. At the end of business on April 12, 2001, the rulemaking record closed. The Administrative Law Judge received three written comments from interested persons during the initial five-working-day period. The Board submitted written comments that were filed by the close of business on April 5, 2001. The Board's written comments responded to matters discussed at the hearing and

comments filed during the initial five-working-day period. Two replies were filed during the responsive period. The Board also filed a reply on April 12, 2001.

This Report must be available for review to all interested persons upon request for at least five working days before the Board takes any further action on the proposed amendments. The Board may then adopt a final rule, or modify or withdraw its proposed amendments.

When the Board files the rules with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all of the testimony, exhibits and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On January 26, 2001, the Board filed the following documents with the Chief Administrative Law Judge:

(a) a copy of the proposed rules, with a certification of approval as to form by the Revisor of Statutes;

(b) a proposed dual Notice of Intent to Adopt Rules With or Without a Public Hearing; and

(c) a draft of the Statement of Need and Reasonableness (hereinafter referred to as the "SONAR").

2. On February 7, 8 and 9, 2001, the Board mailed the Dual Notice of Intent to Adopt Rules to all persons and associations who had registered their names with it for the purpose of receiving such notice. (Ex. G).

3. On February 12, 2001, the Dual Notice of Intent to Adopt Rules and a copy of the proposed rules were published at 25 *State Register* 1375. (Ex. F).

4. On the day of the hearing, the Department placed the following documents in the record:

(a)the Board's Request for Comments on Planned Amendment to Rule Governing Fees published on June 26, 2000, at 24 State Register 1901 (Ex. A);

(b)a copy of the proposed rules dated January 24, 2001, including the Revisor of Statutes approval (Ex. C);

(c) the Statement of Need and Reasonableness ("SONAR") prepared by the Board (Ex. D);

(d)certification that a letter was mailed on February 9, 2001, to the Librarian of the Minnesota Legislative Reference Library, notifying the Librarian of the Board's intent to adopt the proposed rules and transmitting a copy of the SONAR (Ex. E);

(e)the Dual Notice of Intent to Adopt Rules and proposed rules, as published at 25 *State Register* 1375, and a copy of the Dual Notice and proposed rules as mailed to licensees and other interested parties (Ex. F);

(f) the Certificate of Mailing the Dual Notice on February 7, 8 and 9, 2001, the Certificate of Mailing List attesting that the mailing list was accurate, complete, and current as of February 6, 2001, and an accompanying copy of the mailing list (Ex. G);

(g)the Certificate of Giving Notice Pursuant to the Notice Plan approved by the Administrative Law Judge (Ex. H);

(h) copies of written comments received by the Board relating to the proposed rules and names of those who requested a hearing on the proposed rules (Ex. I);

(i) certifications that the notices were mailed pursuant to the Additional Notice Plan that was submitted by the Board with respect to proposed rules and had been approved (Ex. K); and

(j) the text of the agency presentation made at the hearing (Ex. L).

5. All of the listed documents were available for inspection at the Office of Administrative Hearings from the date of filing to April 12, 2001, the date the rulemaking record closed.

Public Input on the Proposed Rules

6. On June 26, 2000, the Board published in the State Register and sent to all licensees a request for comments on its planned rule amendments.[1] The request for comments noted that fees for licensing applications, license renewal, and continuing education sponsor fees were sought to be increased.[2] The request for comments also noted that a new "special fee" was being proposed.[3] The Board received 132 requests for copies of the rule and 31 letters with comments on the proposed fee changes.[4] Additional notice was provided by a mailing that was sent to every licensee, current applicant, and psychology graduate school programs.[5] Three meetings were held with a professional organization comprised of licensees to discuss alternatives to increasing fees.[6]

Nature of the Proposed Rules and Statutory Authority

7. The proposed rules increase the fees charged by the Board for admission to standardized examinations required for licensure, initial license applications, license renewals, conversion of license status, late filings, and application for guest license. For standardized examinations and professional responsibility examinations, the proposed rules would increase the nonrefundable fee from $100 to $150. The fee for application to be a licensed psychologist and renewal of that license would increase from $375 to $500. The late renewal fee for licensees would increase from $187.50 to $250. The fees for licensed psychological practitioner are not proposed for change. The existing application fee for sponsors of continuing education courses would increase from $65 to $80. The existing special fee rule, requiring then-existing licensees to pay a one-time fee of $90 by March 31, 1997, is proposed for repeal. The Board is proposing a new special fee rule that would require payment of a one-time $90 fee by current licensees.

8. The Board relies on Minn. Stat. §§148.905, subd. 1(7), 148.905, subd. 2, and 214.06, subd. 1 as providing authority to adopt the proposed rules.[7] Minn. Stat. § 148.905, subd. 1(7), provides that the Board shall "establish and collect fees for the issuance and renewal of licenses and other services by the board." That provision requires that "Fees shall be set to defray the cost of administering the provisions of sections 148.88 to 148.98 including costs for applications, examinations, enforcement, materials, and the operations of the board."[8] Minn. Stat. § 148.905, subd. 2 authorizes the Board to adopt rules pursuant to Minn. Stat. Chap. 14 to carry out the purposes of Minn. Stat. §§ 148.88 to 148.98. Minn. Stat. § 214.06, subd. 1, provides that, health-related board fees shall be adjusted so that the "total fees collected by each board will as closely as possible equal anticipated expenditures during the fiscal biennium…."

9. The proposed rules establish and set the fees for issuance and renewal of licenses within the meaning of Minn. Stat. § 148.905, subd. 1(7). The adoption of a special fee is an adjustment within the meaning of Minn. Stat. § 214.06, subd. 1. The Administrative Law Judge finds that the Board has statutory authority to adopt the proposed rules.

Cost and Alternative Assessments in SONAR

10. Minn. Stat. § 14.131 (2000) provides that state agencies proposing rules must include in the SONAR a discussion of the classes of persons affected by the rule, including those incurring costs and those reaping benefits; the probable effect of the rule upon state agencies and state revenues; whether less costly or less intrusive means exist for achieving the rule's goals; what alternatives were considered and the reasons why any such alternatives were not chosen; the probable costs of complying with the rule; and differences between the proposed rules and existing federal regulations.

11. In the SONAR, the Board discussed the classes of persons affected by the rules; the probable costs to the Board, other agencies and state revenue; alternatives to

the rule as proposed and why they were rejected; and the probable costs of complying with the proposed rule. The Board indicated that there were no federal regulations in this area.[9] With respect to the classes of persons affected by the rules, the Board indicated that the proposed rule would affect "Licensed psychologists, applicants for licensure as licensed psychologists and licensed psychological practitioners, applicants for licensing examinations, licensees who wish to convert their licensure from master's to doctoral level licensure, applicants for guest licensure, and sponsors applying for approval of continuing education activities…."[10] These persons will see an increase in their examination fees, their license fees, and the costs associated with providing continuing education. The Board also noted that licensees would be affected by the imposition of the special fee.

12. The Board identified that portion of the public using services provided by the profession of psychology as benefiting from the proposed rule.[11] These persons will benefit by the continued oversight of persons licensed to provide those services, and removal of those persons who cannot comply with the rules of practice.

13. There was no specific estimate of probable costs to the Board, other state agencies, and local units of government arising from the proposed rules. The Board did not indicate whether any of these fees are paid by public agencies as part of employment contracts. The Board indicated that its only significant costs from this rule are the costs associated with this rulemaking proceeding.[12] Forms will need to be updated and information concerning the new fee distributed.[13] The costs of processing the current fees and processing larger fees should not change. The Board appended its revenue projections to the SONAR. The Board estimated that the fiscal impact of the proposed special fee rule would be an increase of approximately $336,150 in revenue, which would be used to nearly eliminate the existing deficit.[14] The ongoing expenses of the Board would be covered by the increase in recurring fees. The Board estimated that the proposed rule would generate approximately $300,387 annually in increased revenue.[15] The Board asserts that the proposed rules are needed to carry out the statutory requirement that its fees cover the licensing and examination costs it incurs.[16]

14. As alternatives to the proposed rule, the Board considered (1) attempting to further reduce spending on it operations, (2) using alternative dispute resolution methods to reduce the frequency of litigation in license discipline, (3) offer binding arbitration as an option for licensees contesting discipline, (4) restructuring the size of the ongoing fees and the special fee, and (5) seeking legislative restructuring of the authority to levy civil penalties granted in 1996.[17] The current practices of the Board to keep costs low precludes obtaining additional saving through reductions in spending. Alternative dispute resolution methods are most effective where both sides have incentive to compromise. The Board's experience is that compromise is difficult to achieve. Binding arbitration must be agreed to by both the Licensee and the Board, making it an unreliable means of budget deficit reduction.

15. The Board calculated several different fee structures, but projected that deficits would result a few years after the modification in each case. The civil penalty

legislation had originally been proposed as a means of transferring litigation costs to licensees who violate the standards of practice. The limitations on the civil penalty authority stemmed from opposition by an association of licensees. Under the proposed rules, individual licensees would be required to pay the special fee of $90 and would see an increase of $67.50 per year payable every two years; applicants would see the cost of the two examinations increase by $50 each and the cost of initial licensure increase by $125 (for a two-year license); and various other fees for late renewals, guest licensure, and continuing education sponsorship increase by a range of $15 to $62.50.[18] The Board concluded that the proposed rule was the best method of accomplishing the goal of financing the licensing and examination functions of the Board, consistent with the legislative mandate to recover costs.

16. The Administrative Law Judge finds that the Department has met the requirements of Minn. Stat. § 14.131 relating to explaining costs and alternative assessments.

Performance-Based Rules

17. Minn. Stat. § 14.131 (2000) requires that an agency include in its SONAR a description of how it "considered and implemented the legislative policy supporting performance-based regulatory systems set forth in section 14.002." Section 14.002 states, in relevant part, that "whenever feasible, state agencies must develop rules and regulatory programs that emphasize superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals." Here, the Board indicated that it has already upgraded computer systems to assure year 2000 compliance and will be placing priority on communication with licensees and the public.[19] Addressing the Board's fiscal deficit will allow creation of a website, distribution of a newsletter, printing of informational brochures, electronic distribution of information and electronic application processing.[20] These initiatives cannot be undertaken without elimination of the current deficit and adjustment of prospective fees to cover the Board's anticipated costs. There has been no demonstration that an alternative exists to increasing fees to address the existing and projected shortfalls. The Board has met the requirements of Minn. Stat. § 14.131 regarding performance-based regulatory systems.

Impact on Farming Operations

18. Minn. Stat. § 14.111 (2000) imposes an additional notice requirement when rules are proposed that affect farming operations. The proposed rules will not affect farming operations and no additional notice is required.

Commissioner of Finance Review of Charges in Proposed Rules

19. Minn. Stat. § 16A.1285, subd. 5 (2000) requires that the Commissioner of Finance review and comment on all departmental charges submitted under chapter 14. The Board submitted the charges set forth in the proposed rules to the Commissioner of Finance. The Commissioner's comments and recommendations were attached to the

Board's SONAR as an exhibit. The Board has met the requirements of Minn. Stat. § 16A.1285, subd. 5.

Standards for Analyzing the Proposed Rule

20. Under Minn. Stat. § 14.14, subd. 2 (2000), and Minn. Rule 1400.2100 (1999), one of the determinations that must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule or rule repeal by an affirmative presentation of facts. An agency need not always present adjudicative or trial-type facts in support of a rule. The agency may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences.[21] In addition to its affirmative presentation, the statute allows the agency to rely upon facts presented by others on the record during the rule proceeding to support the proposal.[22]

21. In this case, the Board prepared a Statement of Need and Reasonableness ("SONAR") in support of the proposed rules. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the rules. The Board supplemented the SONAR with the presentation of its Executive Director during the hearing session. The Board also submitted written post-hearing comments.

22. The question of whether a rule is needed focuses upon whether a problem exists that calls for regulation. In an early case after the requirement of establishing need and reasonableness was first enacted, the Chief Administrative Law Judge adopted the rationale that in establishing the need for a rule "the agency must make a presentation of facts that demonstrates the existence of a problem requiring some administrative attention."[23]

23. The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule.[24] Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case.[25] A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute.[26] The Minnesota Supreme Court has further defined the agency's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken."[27]

24. An agency is entitled to make choices between possible approaches as long as the choice it makes is rational. A rule cannot be said to be unreasonable simply because a more reasonable alternative exists, or a better job of drafting might have been done. If commentators suggest approaches other than a rational one selected by the agency, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-

making discretion of the agency. The question is rather whether the choice made by the agency is one a rational person could have made.[28] The Agency is free, however, to adopt a "better" proposal if it chooses to do so, subject to the limitations set forth in Conclusion 7, below.

25. In addition to need and reasonableness, the Administrative Law Judge must assess whether the agency complied with required rule adoption procedures, whether the rule grants undue discretion, whether the agency has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule improperly delegates agency authority to another, and whether the proposed language is not a rule.[29]

26. Where changes are made to the rule after publication in the State Register, the Administrative Law Judge must determine if the new language is substantially different from that which was proposed originally.[30] The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (2000). Pursuant to that statute, a modification does not make a proposed rule substantially different if the differences are within the scope and character of the matter announced by the agency in its notice of intent to adopt rules, the differences are a logical outgrowth of the notice and responsive comments, and the notice provided fair warning that the outcome of the rulemaking proceeding could be the rule in question.

27. The proposed amendments are brief and each will be discussed in this Report. No language was proposed by the Board that differs from the rule as published in the *State Register* and therefore none of the language in the proposed rule can be found to be substantially different from the language published in the *State Register*.

Section-by-Section Analysis of the Proposed Rules

Proposed Rule Part 7200.6100 - Fees

28. The Board proposed to amend the existing rule part 7200.6100 to change the amounts for fees charged for license examinations, applications for licensed psychologist, renewal of those licenses, late fees, conversion of master's licensure to doctoral licensure, and the application for guest licensure. The existing fees for licensed psychological practitioners are not proposed for change. No comments were directed at specific amounts proposed for change. The comments focused on whether the proposed fee increase was truly needed. Therefore the discussion on this rule part will relate to the need for increasing fees generally to meet ongoing costs.

29. In its SONAR, the Board described the costs it has incurred for litigation over license discipline as "extraordinary."[31] Two particular cases have resulted in costs of $117,000 and $178,000. *Id*. After experiencing a period of one case per fiscal year, the Board now has seven matters awaiting initiation of contested case proceedings.[32] The situation is exacerbated by a decline in the number of applicants for licensure and a leveling of the number of persons maintaining licensure.[33] The Board ascribes the existing deficit in its operating budget to "unusually high litigation costs and to the dramatic reduction in the rate of growth of its revenue base; i.e. new licensees."[34]

30. A number of comments from individual licensees pointed out the burden imposed by this fee increase. They point out that psychologists are not a wealthy group and that managed care has reduced their hourly rates.[35] A few comments suggested that some licensees view certain Board members involved in the disciplinary process as hostile.[36] To the extent this contributes to a failure to settle matters, the Board may wish to review these comments.

31. Denise Wilder, M.Eq., L.P., member of the Executive Council of the Minnesota Psychological Association (MPA) testified and submitted written comments in opposition to the proposed rules. The MPA is a professional organization of licensed psychologists. While expressing agreement with the Board's position regarding the increase in costs arising from litigation, the MPA disagreed with the Board's approach in addressing the situation.

32. The MPA suggested that, with the annual number of complaints decreasing from 236 in 1994 to 148 in 2000, disciplinary action should be required in fewer cases. The MPA cited an interview with a Board member indicating that 90 percent of cases are dismissed without discipline.[37] Additional litigation arises, according to the MPA, from changes in how disciplinary actions are pursued. Each asserted change will be discussed individually.

33. The MPA asserted that the language used to describe alleged violations was misleading, causing licensees to challenge complaints where agreement might otherwise be reached. The language complained of can be categorized as information that could identify patients and language placing the alleged violations in a false light.[38] It is suggested that flexibility in how the events are characterized will increase settlements. The MPA also suggested mediation as a less-costly remedy to resolve disagreements about language describing violations. The Board responded that in none of the seven cases awaiting litigation has the licensee admitted wrongdoing.[39] Mediation will only reduce costs where its use results in agreement between the Board and licensees. The Board cannot predict whether licensees will be amenable to reaching agreement.

34. The practice of adding additional allegations of violations of the Psychology Practice Act (Minn. Stat. §§ 148.88-.98) during the course of investigation was criticized as causing additional contested cases. The MPA suggested that, since the Board has the "last word in any disciplinary matter short of the Appellate Court," it need not add allegations just because it believes some may be rejected at the hearing stage.[40] The Board indicated that it cannot overlook evidence of wrongdoing consistent with the Board's obligation to protect the public.[41]

35. The Board does issue the final decision in any disciplinary action against one of its licensees. But each decision is appealable to the Court of Appeals. The Board is limited to the record established in the contested case hearing in determining the propriety of discipline and the degree of sanction to be imposed. Evidence of other violations is important to both considerations. The due process protections of each licensee's rights impose limitations on the Board's power to act. Adequate investigation

and an opportunity to challenge the Complaint Committee's findings are fundamental parts of the disciplinary process. The practice of adding allegations to the original complaint is within the Board's discretion in conducting license discipline. Cumulative allegations seem less necessary, however.

36. The MPA asserts that the Board has incurred unnecessary costs by pursuing discovery of medical records for the purpose of proving a licensee suffers from impairment and therefore should not be licensed. As an alternative, the MPA proposed obtaining releases for the medical information and appointing an independent expert. The Board responded that it has sought such records only twice in the last twenty-five years. There is no evidence that significant costs are arising from these proceedings. The MPA's approach relies upon a licensee consenting to the release of information. If that consent is not forthcoming, there is no difference in the outcome.

37. Where a licensee violates the Psychology Practice Act, the MPA notes that the Board has the authority to impose a civil penalty in addition to other discipline. The MPA indicates that it has supported the introduction of legislation in this session of the Legislature that would expand the Board's authority in this area. Even with this support, the MPA notes that the availability of greater sanctions may have the unintended consequence of increasing the number of contested cases, as licensees challenge sanctions to avoid being required to pay civil penalties. There is no evidence in the record to show that civil penalties are routinely collected. The imposition of civil penalties is not presently a reliable method of increasing revenue to meet ongoing costs.

38. The MPA notes that some disciplinary matters appear to reach an impasse and asserts that attorney costs will be reduced if some mechanism exists to reach a timely conclusion of the negotiation phase of the proceeding. The Board disputed the characterization of negotiations reaching an impasse. The mechanism for resolving matters was described, noting that each case in negotiation can only be discussed at the monthly Board meetings and this adds to the time required to negotiate settlements. Board Comment, at 6.

39. The growing availability of professional liability insurance coverage is cited by the MPA as likely to cause more licensees to challenge the Board's efforts to impose discipline. The MPA suggests that the Board modify its approach to discipline to avoid incurring more costs through contested case hearings. However, the standards of practice are applicable to all licensees and need to be enforced on that basis.

40. The use of attorney time by the Board was also criticized by the MPA as adding unnecessary costs to the contested case process. The use of prehearing depositions and attendance of counsel at settlement conferences were cited as unnecessary costs. The Board responded that the depositions were limited to "extremely complicated multi-issue cases."[42] The Board indicated that there is a need for determining a licensee's position prior to the hearing and that the costs of such depositions is a minimal portion of the contested case cost.[43] The Board indicated that having counsel present at settlement conferences was needed to ensure that

procedural and due process requirements are met.[44] It believes that use of an attorney at this stage prevents costly mistakes. The Board's approach to prehearing use of counsel is within its discretion and does not affect the reasonableness of the proposed rule.

Proposed Rule Part 7200.6105 – Continuing Education Sponsor Fee

41. The Board proposed an increase of the existing fee for sponsoring continuing education courses in part 7200.6105. The existing fee of $65 is proposed for increase to $80. No commentators objected to the proposed increase. The Board has shown the increase in the continuing education sponsor fee to be needed and reasonable.

Repeal of Rule Part 7200.6170 – Special Fee
Proposed Rule Part 7200.6175 – Special Fee

42. The last time a deficit in Board revenue was made up by licensees was in 1996, when part 7200.6170 was adopted. That rule required existing licensees to pay a one-time fee of $90.00 by March 31, 1997. Since that rule only applied to persons licensed in 1996, there is no reason to retain the rule language. The Board proposes to repeal this provision. No commentator objected to the proposed repeal. Repealing part 7200.6170 is both needed and reasonable.

43. To address its current deficit, the Board proposed part 7200.6175. Part 7200.6175 imposes a $90 fee on all licensees to be postmarked on June 22, 2001. A late fee of $45 is proposed for those licensees who fail to meet the deadline. Licensing and renewal are to be withheld from any person failing to timely pay the special fee and late fee.

44. The budget projections used to calculate the level of fee increase were questioned by Dr. Steven Peltier, Ph.D., L.P. (also on behalf of the MPA). The MPA indicated that they had been informed that the Board did not have a Finance Committee. The MPA suggested that better oversight of the Board's financial affairs would result in more accurate numbers and might affect the need for a fee increase.

45. The Board responded that its day-to-day finances are delegated to staff, but the entire Board votes on expenditures.[45] The Board also noted that its finances had been subject to two audits, each by a different State agency within the last four years. The differing numbers are attributed to accounting of revenue and expenditures on a daily basis.[46]

46. The most recent deficit number identified by the Board is $351,000. Board Comment, at 7. The Board's calculation indicates that the existing deficit will be nearly eliminated by setting the special fee at $90. *Id*. The Board indicated that to fully eliminate the deficit, the fee should be $95, but the Board declined to propose a change of the fee amount in the rule.

47. Carol L. Anderson, Psy.D., Clinical Psychologist, who practices in Illinois, asserted that the Board's spending was excessive and indicated that other states, such as Illinois, had far lower fees for licensure.[47] Dr. Anderson indicates that she may have to drop her Minnesota license if the increase in fees are adopted. Dr. Peltier also cited Illinois as an example of a fee governed system with lower costs than the Board.[48] The Board responded that Illinois has a single department for regulating all professional licensees, in contrast to Minnesota, with the Board regulating only psychologists and related practitioners.[49] The Illinois department also collects fees for more licensees. The experience in Illinois does not demonstrate that the Board's proposed rule is unreasonable.

48. Minn. Stat. § 214.06, subd. 1, requires that health-related licensing boards "shall by rule, with the approval of the commissioner of finance, adjust, as needed, any fee which the commissioner of health or the board is empowered to assess." The statute further specifies that, "[a]s provided in section 16A.1285, the adjustment shall be an amount sufficient so that the total fees collected by each board will as closely as possible equal anticipated expenditures during the fiscal biennium . . . ." Minn. Stat. § 16A.1285, subd. 2, provides that, unless otherwise specified by statute, state agencies must set licensure fees "at a level that neither significantly over recovers nor under recovers costs, including overhead costs, involved in providing the services."

49. The Board's approach comports with the standards set out in Minn. Stat. §§ 16A.1285 and 214.06 governing the setting of fees by rule. The Board has demonstrated that an adjustment of the fees is needed and that the amounts proposed are reasonable.

50. The fee adjustments are required under Minn. Stat. § 214.06 and 16B.1285 in order to ensure that departmental earnings from licensing fees recover the cost of that service. Current costs and projected future costs were used to set the fee levels. As required by law, the Department of Finance reviewed and approved the cost estimates and revenue projections that guided the Board to its conclusion as to what fee increase would be appropriate. The Administrative Law Judge finds that the increases in fees has been shown to be needed, reasonable, and consistent with the Board's authority and obligations under relevant state statutes.

51. However, the detailed suggestions made by the MPA and others underline the serious concern about these fee increases. Even though the Board has the authority and discretion to make these adjustments, this record contains numerous ideas to limit expenditures that should be examined and considered by the Board.[50] Additionally if, as suggested by commentors, other states with a similar number of licensees or complaints have significantly lower budgets, the Board may want to obtain information about their procedures.[51] Some of the suggestions made by commentors would require legislature changes to the Psychology Practice Act.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Board of Psychology gave proper notice of the hearing in this matter.

2. The Board has fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1 and 1a, and 14.14, subds. 2 and 2a, and all other procedural requirements of law or rule.

3. The Board has demonstrated its statutory authority to adopt the proposed rules and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50(i)(ii).

4. The Board has documented the need for and reasonableness of its proposed rules with an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2, and 14.50(iii).

5. There were no amendments or additions to the proposed rules suggested by the Board after publication in the State Register. Therefore, the rules are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3, and Minn. R. 1400.2240, subp. 7.

6. Any Findings which might be properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the proposed rules be adopted.

Dated this 10th day of May, 2001.

S/ George A.
Beck

GEORGE A. BECK
Administrative Law Judge

Reported: Tape Recorded, Two Tapes (No Transcript Prepared)

[1] 24 *State Register* 1901 (June 26, 2000) (Ex. A); SONAR, at 8.
[2] Ex. A.
[3] *Id*.
[4] SONAR, at 8.
[5] SONAR, at 9.
[6] *Id*.
[7] SONAR, at 2.
[8] Minn. Stat. § 148.905, subd. 1(7).
[9] SONAR, at 7.
[10] SONAR, at 3.
[11] SONAR, at 4.
[12] SONAR, at 4.
[13] *Id*.
[14] SONAR, at 3 and Attachment entitled "One Time Assessment."
[15] SONAR, Attachment entitled "Revenue Projections for FY2000 – FY2009. The annual increase is arrived at by subtracting the FY 2000 total from the FY 2001 total, not including the special assessment fee amount.
[16] SONAR, at 2-3.
[17] SONAR, at 5-6.
[18] SONAR, at 7.
[19] SONAR, at 8.
[20] *Id*.
[21] ***Manufactured Housing Institute v. Pettersen***, 347 N.W.2d 238, 244 (Minn. 1984); ***Mammenga v. Department of Human Services***, 442 N.W.2d 786 (Minn. 1989).
[22] Minn. Stat. § 14.14, subd. 2 (2000).
[23] Report of the Hearing Examiner, ***In the Matter of the Proposed Adoption of Rules Relating to the Control of Emissions of Hydrocarbons***, OAH File No. PCA-79-008-MG.
[24] ***In re Hanson***, 275 N.W.2d 790 (Minn. 1978); ***Hurley v. Chaffee***, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950).
[25] ***Greenhill v. Bailey***, 519 F.2d 5, 10 (8th Cir. 1975).
[26] ***Mammenga v. Department of Human Services***, 442 N.W.2d 786, 789-90 (Minn. 1989); ***Broen Memorial Home v. Minnesota Department of Human Services***, 364 N.W.2d 436, 444 (Minn. App. 1985).
[27] ***Manufactured Housing Institute***, 347 N.W.2d at 244.
[28] ***Federal Security Administrator v. Quaker Oats Company***, 318 U.S. 218, 233(1943).
[29] Minn. R. 1400.2100 (1999).
[30] Minn. Stat. § 14.15, subd. 3 (2000); Minn. R. 2100(C) (1999).
[31] SONAR, at 12.
[32] *Id*.
[33] SONAR, at 11.
[34] SONAR, at 13.
[35] Ex. 1, 4, p. 7-8, 6, 8.
[36] See e.g., Ex. 4, p. 2.
[37] Public Ex. 2, at 3.
[38] Public Ex. 2, at 3.
[39] Board Comment, at 4.
[40] Public Ex. 2, at 4.
[41] Board Comment, at 5.
[42] Board Comment, at 3.
[43] Board Comment, at 4.
[44] *Id*.
[45] Board Reply, at 1.

[46] Board Comment, at 7.
[47] Public Ex. 1.
[48] Ex. 12, at 1.
[49] Board Comment, at 1.
[50] See e.g., Ex. 2, p. 6-7.
[51] See e.g., Ex. 13, p. 1.